

**United States Department of Labor
Employees' Compensation Appeals Board**

M.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Melrose Park, IL, Employer**

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**Docket No. 17-0361
Issued: March 28, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 1, 2016 appellant filed a timely appeal from a June 6, 2016 nonmerit decision of the Office of Workers' Compensation Program (OWCP).¹ As more than 180 days elapsed from OWCP's last merit decision dated April 2, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). The Clerk received the current appeal on December 6, 2016. However, one hundred and eighty days from OWCP's June 6, 2016 decision was December 3, 2016. As this fell on a Saturday, the appeal would have been due the following business day, which was Monday, December 5, 2016. Because using the December 6, 2016 date of receipt would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 1, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 68-year-old former carrier, has an accepted occupational disease claim (Form CA-2a) for lumbar intervertebral disc displacement, which arose on or about September 1, 1995. She underwent OWCP-approved lumbar surgery on October 12, 2009, and has not since returned to gainful employment.³ Appellant received wage-loss compensation for temporary total disability beginning October 7, 2009.⁴

In a February 26, 2014 report, Dr. Allan Brecher, a Board-certified orthopedic surgeon and OWCP-referral physician, detailed appellant's factual and medical history and discussed the findings of the physical examination he conducted on that date. He noted that, on physical examination, appellant had subjective complaints of left leg numbness and 5/5 strength in her lower extremities. Dr. Brecher determined that appellant had a permanent aggravation of her lumbar spine condition, which was not causing any ongoing problems in her lower extremities based on his examination. He found that appellant could perform her regular work with respect to the lumbar spine.⁵

On December 18, 2014 appellant filed a claim for a schedule award (Form CA-7). In support of her claim, she submitted a November 17, 2014 impairment rating from Dr. Anatoly Rozman, a Board-certified physiatrist. Dr. Rozman determined that appellant had permanent impairment of her lower extremities under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter A.M.A., *Guides*). He indicated that he used *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) to calculate appellant's bilateral lower extremity impairment. Dr. Rozman found 11 percent permanent impairment of her right lower extremity due to sensory and motor deficits associated with the L3 nerve distribution and 10 percent permanent impairment of her right lower extremity due to sensory and motor deficits associated with the L4 nerve distribution. He also found that appellant had nine percent permanent impairment of her left lower extremity due to sensory and motor deficits associated with the L3 nerve distribution and nine percent permanent impairment of her left lower extremity due to sensory and motor deficits associated with the L4 nerve distribution.

In a report dated January 20, 2015, Dr. Michael Hellman, a Board-certified orthopedic surgeon and OWCP medical adviser, determined that the evidence of record failed to establish a bilateral lower extremity permanent impairment. He advised that he disagreed with

³ Appellant retired effective April 30, 2014.

⁴ OWCP placed appellant on the periodic compensation rolls effective December 19, 2010. Appellant continued to receive wage-loss compensation for temporary total disability through May 31, 2014, at which time she elected to receive retirement benefits from the Office of Personnel Management.

⁵ Dr. Brecher indicated that appellant had left-sided spinal stenosis and wasting in her left hand, which were not related to work factors.

Dr. Rozman's rating of permanent impairment in the lower extremities and noted that Dr. Brecher indicated in his February 26, 2014 report that appellant had subjective complaints of left leg numbness and 5/5 strength in her lower extremities. Dr. Hellman also noted that, under Table 16-11 on page 533 of the sixth edition of the A.M.A., *Guides*, the sensory severity for appellant's lower extremities was "Normal" and the motor severity for her lower extremities was "Normal." Application of the standards of *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) yielded a finding that appellant had no ratable permanent impairment of either lower extremity.

In a decision dated April 2, 2015, OWCP denied appellant's schedule award claim, noting that she had not established permanent impairment to a schedule member due to her accepted work injury. It discussed the evidence of record, including Dr. Hellman's January 20, 2015 assessment, and found that the evidence did not establish that appellant had permanent impairment of a scheduled member.

On April 1, 2016 OWCP received appellant's request for reconsideration, which consisted of the appeal request form that accompanied the April 2, 2015 decision, as well as a March 31, 2016 handwritten statement. Appellant asserted that she had a "legal argument" concerning Dr. Brecher's February 26, 2014 report and indicated that she did not remember Dr. Brecher examining her on that date, other than being asked to bend forward and undergo reflex testing for her knees. She asserted that Dr. Brecher asked her why she was sent to him for examination.⁶ Appellant expressed her belief that she "should be awarded for nerve loss" to her lower extremities based on unspecified electromyogram testing and the pain she endured for the past 15 years due to her accepted work injury.

By decision dated June 6, 2016, OWCP denied appellant's request for reconsideration. It determined that the March 31, 2016 letter did not raise any relevant legal argument not previously considered and that appellant's application for reconsideration did not otherwise require reopening her claim for review of the merits.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁷ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁸ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁹ A timely application for reconsideration, including all supporting documents, must set

⁶ Appellant claimed that she had not received a copy of Dr. Brecher's February 26, 2014 report.

⁷ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607.

⁹ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁰ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS

OWCP issued a decision on April 2, 2015 denying appellant's claim for a schedule award. Appellant requested reconsideration of this decision by letter dated March 31, 2016 and a form dated April 1, 2016. Both of these documents were received by OWCP on April 1, 2016. As noted above, the Board does not have jurisdiction over OWCP's April 2, 2015 merit decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), thereby warranting reopening of the case for further merit review. The Board finds that in her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a new and relevant legal argument not previously considered by OWCP.

In her March 31, 2016 letter, appellant claimed that she had a legal argument concerning the February 26, 2014 report of Dr. Brecher, OWCP's referral physician, but she did not present any such argument. She asserted that Dr. Brecher conducted a limited physical examination and questioned why she was referred to him. Appellant felt that she should be awarded for "nerve loss" in her lower extremities due to the accepted work injury, which should have entitled her to schedule award compensation. In essence, her argument was that she had concerns about Dr. Brecher's evaluation and she felt that her symptoms warranted receipt of schedule award compensation. However, OWCP has already considered the medical evidence of record, including the opinion of Dr. Brecher, in conjunction with the question of whether appellant has permanent impairment of a schedule member due to the accepted work injury. It found that the medical evidence of record did not establish such permanent impairment and appellant's mere disagreement with this finding would not require reopening of her claim for merit review. The submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹²

The underlying issue in this case is whether the medical evidence demonstrated permanent impairment of a schedule member due to appellant's work injury, which would entitle her to schedule award compensation under FECA. That is a medical issue which must be addressed by relevant medical evidence.¹³ A claimant may be entitled to a merit review by

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* § 10.608(a), (b).

¹² *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980). Appellant asserted that she had not received a copy of Dr. Brecher's February 26, 2014 report, but she did explain how this unsubstantiated assertion required reopening of her claim for merit review. She asserted that electromyogram testing supported her schedule award claim, but she did not identify the specific testing to which she referred.

¹³ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

submitting pertinent new and relevant evidence, but appellant did not submit any such evidence in this case.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board